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FEDERAL COMMUNICATIONS COMMISSION
(OFFICE OF THE SECRETARY)

January 19, 1993

HAND DELIVER

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Dear Ms. Searcy:

On behalf of Capital Cities/ABC, Inc., transmitted herewith for filing with the Commission are an original and five copies of its Reply Comments in MM Docket No. 92-259.

If there are any questions in connection with the foregoing, please contact the undersigned.

Sincerely,



Kristin C. Gerlach

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Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Implementation of the Cable)	
Television Consumer Protection)	MM Docket No. 92-259
and Competition Act of 1992)	
)	
Broadcast Signal Carriage Issues)	

REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

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Implementation of the Cable)
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Broadcast Signal Carriage Issues)

To: The Commission

REPLY COMMENTS OF CAPITAL CITIES/ABC, INC.

Capital Cities/ABC, Inc. ("Capital Cities/ABC") submits herewith its Reply Comments in the above-entitled proceeding. Our Reply Comments are limited to two issues raised by the National Cable Television Association ("NCTA") in its comments: (a) the relationship between retransmission consent and network non-duplication rules; and (b) the circumstances triggering the requirement that a station make the same election (either must-carry or retransmission consent) for cable systems servicing the same geographic area.

I. RETRANSMISSION CONSENT AND NETWORK NON-DUPLICATION

NCTA proposes that the network non-duplication rules be eliminated for those stations electing retransmission

consent because they are "outmoded" in this context.¹ According to NCTA's argument, it is unfair to give stations a purported advantage afforded by the rules in bargaining with cable systems for retransmission consent. In NCTA's view, network affiliates wishing to preserve their exclusivity over network programming would be required to forego the benefits of negotiating retransmission consent in favor of a must-carry election.

NCTA's position ignores the basic fact that there is no suggestion in the Act or in the legislative history that the network non-duplication rules should be eliminated under retransmission consent; in fact, the Senate Report expressly states that the continued existence of the rules is critical to the regulatory structure envisioned under the Act. Moreover, NCTA completely ignores the preservation of localism which is the primary purpose of the network non-duplication rules.

The Senate Report is explicit in its insistence that the network non-duplication rules are critical to localism in the context of retransmission consent. Thus, it states that:

the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S.12.

¹ NCTA Comments at pp. 34-36.

S. Rep. No. 92, 102nd Cong., 1st Sess. 38 (1991) ("Senate Report"). The legislative history is not surprising. The over-the-air broadcast system in this country is fundamentally premised on the strength of local broadcast stations. The findings in the Act itself also emphasize the critical importance of local commercial broadcast stations, both in terms of the content of the programming provided and its availability at no cost to viewers who do not subscribe to cable.²

Contrary to NCTA's assertion, the concept of free negotiation over retransmission consent is not inconsistent with network non-duplication rules. First, there is nothing "unfair" about the benefits of these rules for local stations. In fact, there is a more persuasive case that cable systems have the clear bargaining advantage since they face virtually no competition from other multichannel program distributors. Local broadcasters are essentially forced to deal with one cable system for each geographic area in which they seek carriage. Whatever "threat" NCTA perceives to its bargaining leverage in this context is no threat to the public interest, and is in any event outweighed by the importance of localism.

Moreover, adoption of NCTA's position would completely disregard the significant interests of the national television networks to control the distribution of their

² See, e.g., §§ 2 (a) (9), (11), (12).

programming. The television network broadcast system, which supplies free over-the-air programming to the entire nation, comprises a unique blend of national and local programming. Networks have a keen interest in choosing both their local outlets and in affording those outlets exclusivity to allow for the most efficient distribution of that programming. The network non-duplication rules aid in this process by permitting them to negotiate with their local affiliates regarding the geographic area in which the stations can assert "exclusive" rights for cable distribution of network programming. Without these rules, the cable compulsory license would effectively bar local affiliates from asserting such exclusive rights. Since the strength of the network ultimately depends on the strength of its local affiliates, the network also has a critical interest in preserving the viability of its affiliates by affording them exclusivity for network programming in their local market areas.

II. STATIONS NEED MAKE THE "SAME ELECTION" ONLY AS TO CABLE SYSTEMS IN SUBSTANTIAL SERVICE AREA OVERLAP SITUATIONS

NCTA argues that a station be required to make the same election regarding must-carry or retransmission consent for all cable systems in its ADI.³ There is no basis in either the 1992 Cable Act or the legislative history to support this position.

³ NCTA Comments at pp. 26-28.

The Act provides that a station must make an election between the right to grant retransmission consent and the right to signal carriage under §614 (must-carry), and further provides that "[i]f there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems."⁴ If Congress had intended that "the same geographic area" be equivalent to the ADI "television market" as defined in the Act, it would have specifically said so. Moreover, the fact that the election is to be made on a system-by-system basis within the television market is clear from the legislative history.⁵

We agree with the Commission that, at a minimum, cable systems must be "directly compet[itive]" in order for the "same election" requirement to apply,⁶ and that consequently there must be a substantial overlap in the service areas of such systems. As the legislative history indicates, the requirement was intended to apply to situations in which there is direct competition between cable systems,

⁴ Section 325(b)(3)(B) (emphasis supplied).

⁵ "...[E]ach television station which has carriage ... rights under sections 614 and 615 will make an election between those rights and the right to grant retransmission authority for each local cable system ..." Senate Report at 38.

⁶ MM Docket No. 92-259, Notice of Proposed Rule Making, FCC 92-499 (rel. November 19, 1992) ("Notice") at paragraph 45.

such as overbuilds.⁷ Systems whose service areas do not overlap and do not serve the same subscribers are not directly competitive, regardless of their presence in the same ADI.

We also agree with CBS that while there is no "magic number" for degree of overlap, the Commission, in fashioning its regulations, should be mindful of the Act's underlying purpose of giving broadcasters the ability to control distribution of their signals.⁸ Stations should have the flexibility to negotiate the arrangements that best serve their competitive needs, on a cable system-by-cable system basis. Adopting NCTA's proposal, in contrast, would completely frustrate the Act's goal of encouraging marketplace solutions to competitive situations.⁹

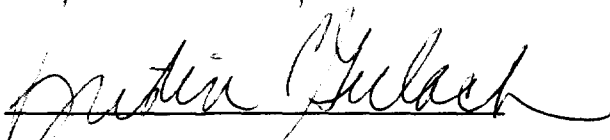
⁷ The election "will apply to any so-called overbuild systems which serve the same geographic area." Senate Report at 33. "In situations where are competing cable systems serving one geographic area, a broadcaster must make the same election with respect to all such competing cable systems." Conference Report at 76 (emphasis supplied). Quoted at footnote 60 of the Notice.

⁸ CBS Comments at pp.7-8.

⁹ "It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing negotiations." Senate Report at p. 36.

Respectfully submitted,

By:

A handwritten signature in dark ink, appearing to read "Sam Antar", is written over a horizontal line.

Sam Antar
Vice President, Law & Regulation

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